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In Case Number CV 06 05411 SBA (Ballard)*

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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

In Re WAL-MART STORES, INC.
WAGE AND HOUR LITIGATION

Case Numbers: C 06 02069 SBA

CLASS ACTION

**[Proposed] ORDER DENYING
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT/ADJUDICATION DIRECTED
TOWARD THE PLAINTIFF CLASS**

This Document Relates To:

Case Nos.

C 06 02069 SBA (Smith) and
CV 06 05411 (SBA) Ballard

Date: April 22, 2008
Time: 1:00 p.m.
Location: United States Courthouse
Courtroom 3, Third Floor
1301 Clay Street
Oakland, CA 94612-5212

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ORDER

This matter comes before the Court on Defendant's Motion for Summary Judgment/Adjudication directed toward the plaintiff class (Docket No. 269). The Court has considered the parties' filings [and statements made at oral argument on this Motion, which was held on April 22, 2008].

BACKGROUND

Plaintiffs Smith, Wiggins, Ballard and Lyons are all former employees of defendant in the State of California. On March 20, 2006, plaintiffs Smith and Wiggins filed their complaint in this Court. On May 17, 2006, plaintiffs Ballard and Lyons filed their similar action in the Superior Court of California, Los Angeles County. Defendant removed the Ballard/Lyons, and that matter was transferred and consolidated with Smith/Wiggins before this Court. On March 27, 2007, plaintiffs filed their First Amended Consolidated Complaint. Defendant filed a motion to dismiss, which was denied in part and granted in part.

The First Amended Consolidated Complaint seeks to recover for defendant's alleged violation of California *Labor Code* §201 (failure to timely pay all earned wages upon termination), *Labor Code* §227.3 (failure to pay accrued vacation upon termination), and restitution pursuant to California *Business & Professions Code* §17200, based upon the *Labor Code Violations*.

Plaintiffs' Motion for Class Certification was granted in part and denied in part on February 12, 2008. The Court certified the following class:

All former store employees of Wal-Mart (including Wal-Mart Stores, Wal-Mart Supercenters and Sam's Clubs) in the State of California whose employment ended during the period from March 20, 2002 through the date a judgment is rendered in this matter, and who are members of one or both of the following Subclasses:

Subclass No. 1: Class Members who, according to Wal-Mart's computerized records, have not been paid all accrued and unused vacation and personal time they earned while employed by Defendant.

Subclass No. 2: Class Members who, according to Wal-Mart's computerized records, have not been paid all wages, which include hourly pay, salary, and geographical

1 assistance pay, they earned while employed by Wal-Mart

2 LEGAL STANDARD

3 Fed. R. Civ. P. 56(c) requires that a moving party demonstrate to the satisfaction of the court
4 "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a
5 matter of law." As noted below, that standard requires that even the slightest doubt about the
6 sufficiency of the evidence should be resolved in favor of plaintiff.

7 The United States Supreme Court held, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252,
8 106 S.Ct. 2505, (1986) that the Court must determine "whether reasonable jurors could find by a
9 preponderance of the evidence that the plaintiff is entitled to a verdict." Credibility determinations and
10 the weighing of the evidence as well as the drawing of legitimate inferences from the facts are
11 functions for the jury. *Id* at 255. The party opposing the motion need only present evidence "from
12 which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that
13 requires a trial." *Id* at 256.

14 Because summary judgment is a "drastic device" cutting off a party's right to present
15 its case to a jury, the moving party bears a "heavy burden" of demonstrating the
16 absence of any triable issue of material fact. *Nationwide Life Ins. Co. v. Bankers
Leasing Ass'n, Inc.*, 182 F.3d 157, 160 (2d Cir.1999).

17 *Avalos v. Baca*, 2006 WL 2294878 (C.D.Cal. 2006), at *1

18 ANALYSIS

19 A. The First Amended Consolidated Complaint Clearly Alleges Claims for 20 Unpaid and Earned Wages Due Upon Termination

21 Wal-Mart alleges that it is entitled to summary adjudication as to the Sub-Class Two "Wage"
22 Claim because there is no claim for wages made in the First Amended Consolidated Complaint. Wal-
23 Mart further alleges that Plaintiffs' voluntary dismissal of the breach of contract and Labor Code
24 §1194 claims (the Labor Code is hereafter referred to as L.C.) (the Third Cause of Action in the
25 FACC) bars Plaintiffs' recovery of their underlying wages. This is incorrect.

26 The Court has reviewed the Stipulation of the parties wherein certain claims were dismissed
27 and certain language voluntarily stricken from the First Amended Consolidated Complaint. The
28 purpose of the stipulation was clearly to eliminate overtime claims that were duplicative of those raised

1 in another pending action against this defendant (*Newland vs. Wal-Mart Stores, Inc.*). Nothing in the
 2 Stipulation evidences an intent upon the part of the plaintiffs to dismiss their claim for ordinary wages.

3 Further, the First Cause of Action of the FACC clearly seeks recovery of unpaid wages,
 4 including those sought by Sub-class No. 2. The FACC placed defendant on fair notice of the claims
 5 being made by these plaintiffs. In addition, the FACC clearly seeks recovery of wages based upon
 6 alleged violations of California *Labor Code* §§201 - 202 (failure to pay earned wages upon
 7 termination), as well as under California *Business & Professions Code* §17200, et.seq. (Unfair
 8 Business Practices), under both the unlawful and the unfair prongs of that statutory scheme.

9 **B. A Genuine Factual Dispute Exists as to Whether Sub-class No. 2 Is Owed**
 10 **Unpaid Wages**

11 Defendant asserts, based upon the opinion of its expert, that Sub-Class No. 2 is not owed any
 12 wages. Plaintiffs' expert disputes that contention in some detail, including providing the Court with
 13 examples of errors in the calculations made by defendant's expert.

14 The disagreement between the only two experts named in this case must be resolved at trial:

15 Credibility determinations, the weighing of the evidence, and the drawing of legitimate
 16 inferences from the facts are jury functions, not those of a judge, whether he is ruling
 17 on a motion for summary judgment or for a directed verdict. The evidence of the
non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 255

19 There is no basis or justification for granting greater consideration to the expert retained by
 20 defendant than the expert retained by plaintiffs. Plaintiffs have established that a genuine issue of
 21 material fact exists as to the amount of damages owed to Sub-class No. 2, and summary
 22 judgment/adjudication of the claims of this sub-class would be improper.

23 The other issues raised in connection with the claim that Sub-Class No. 2 has no damages are
 24 mooted by the existence of the genuine issue of material fact as to the existence of and amount of said
 25 damages. This analysis applies to defendant's claim that class representative Ballard lacks Article III
 26 standing. (See, Order Denying Motion for Summary Judgment/Adjudication as to Plaintiffs Ballard,
 27 Wiggins and Smith, filed contemporaneously herewith).

C. Defendant's Motion for Summary Adjudication Of Plaintiffs' Claims Under Labor Code §§227.3 and 203 Must Be Denied

Plaintiffs have presented evidence to establish that a genuine issue of fact exists as to whether plaintiffs and the Sub-class No. 1 are entitled to recover pursuant to *Labor Code* §§ 227.3 and 203. Defendant again attempts to assert that *Labor Code* §208 somehow stands as a bar to recovery by the plaintiffs and the class. However, and as noted in this Court's Order granting class certification:

Wal-mart also curiously asserts, without any apparent basis in fact, that the unpaid wages reflected as being "on the books" in the databases might be unpaid because the employee never came to collect their final pay, and therefor the same issue that is fatal to Sub-Class No. 3 is also fatal to the other subclasses. *See* Opp'n at 24; Martin Decl. ¶V. However, Dr. Shapiro asserts, and Wal-Mart does not deny, that the entries in the databases were created contemporaneously with either a final cash payout or the cutting of a final paycheck, and Shapiro assumes that the employee received the final pay as calculated by Wal-Mart. The question is therefore one of faulty calculations of final pay by Wal-mart, not whether the amounts as calculated were ever received; the issue of whether or not an employee came in to pick up his or her final pay is simply not relevant to Subclasses No. 1 and 2."

Plaintiffs have established the existence of a genuine issue of fact concerning this issue and the matter must be left to the jury for determination.

D. Defendant's Motion For Summary Adjudication Based Upon A Claim Of A Lack of Willfulness Must Be Denied

Defendant has proposed and argued a standard for willful conduct in connection with a violation under *Labor Code* §203 that is incorrect. The definition of "willful" under §203 is unambiguously set forth in Title 8, *California Code of Regulations*, §13520, as noted in California's DLSE Manual Section 4.2:

A willful failure to pay wages within the meaning of L.C. Section 203 occurs when an employer intentionally fails to pay wages to an employee when those wages are due. However, a good faith dispute that any wages are due will preclude imposition of waiting time penalties under Section 203.

A 'good faith dispute' that any wages are due occurs when an employer presents a defense, based in law or fact, which if successful, would preclude any recovery on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist. Defenses presented which, under all the circumstances, are unsupported by any evidence, are unreasonable, or are presented in bad faith, will preclude a finding of a 'good faith dispute.'

California's DLSE manual section 4.2.2.1 states that "[t]he civil penalty assessed under L.C.

1 §203 does not require that the employer intended the action; merely that the action occurred and it was
2 within the employer's control. (*Davis v. Morris* (1940) 37 Cal.App.2d 269)".

3 Plaintiff has established that a genuine issue of fact exists as to whether defendant's conduct
4 in connection with its system for payment to terminating employees meets the standard of willfulness.
5 The motion for summary adjudication must be denied.

6 **E. Statute of Limitations**

7 Defendant's claim that the statute of limitations for members of Sub-class No. 2 is limited to
8 1 year because there are no wages that remain unpaid is denied as moot. A genuine issue of material
9 fact exists as to whether that sub-class is owed wages.

10 There appears to be no dispute that the period of limitations for claims for penalties under
11 *Labor Code* §203 is three years preceding the filing of the original action herein.

12 **CONCLUSION**

13 Defendant's Motion for Summary Judgment/Adjudication as to the plaintiff class is DENIED.
14 The Court notes that the applicable statute of limitations for claims pursuant to *Labor Code* §203 is
15 three years and that the parties are in agreement in that regard.

16
17 Dated:

18 _____
Saundra Brown Armstrong
United States District Judge